Hovsepian v. Apple, Inc. Doc. 304

[COUNSEL LISTED ON SIGNATURE PAGE]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

In re

ACACIA MEDIA TECHNOLOGIES CORPORATION

Case No. C-05-01114 JW

DEFENDANTS' MOTION TO CONTINUE HEARING DATE (CIVIL L.R. 7-11)

Judge: Honorable James Ware

Dockets.Justia.com

I. INTRODUCTION

Defendants[1] move to continue the hearing on Acacia's motion for summary judgment of invalidity—that is, Acacia's motion for summary judgment *against* itself—and to reschedule that hearing to coincide with the hearing on defendants' pending motions for summary judgment of invalidity under 35 U.S.C. § 112. Acacia has brought its motion for a single, improper purpose: to try to strip this Court of jurisdiction to decide defendants' pending motions. By doing so, Acacia is defying this Court's ruling expressly allowing defendants to bring their motions.

II. FACTUAL BACKGROUND

Since at least April, Acacia has been trying to package this case for appeal on a limited set of issues that Acacia has hand-selected. Initially, after the Court issued its Sixth Claim Construction Order [Doc. No. 266], Acacia agreed with the defendants that, "in the interest of judicial economy," the Court should next decide any § 112 issues that defendants raised on summary judgment. [Doc No. 267 at 2:12-17; *see also* Doc. No. 274-2 at pp.12-13 ("[T]he Defendants then said . . . let's get as many issues up that we can get up . . . that bear on not only indefiniteness but enablement issues, [and] written description issues. . . . *Now, we're amenable to that and that's included in this proposal*.") (emphasis added).]

After the defendants gave Acacia a list of their proposed § 112 motions, however, Acacia reversed course. Acacia then asserted, for the first time, that because it was willing to stipulate to invalidity on certain narrow grounds, the Court should not rule on defendants' other § 112 arguments. [Doc. No. 274-5.] Specifically, Acacia asked the defendants to stipulate to a judgment of invalidity on certain limited grounds strategically selected by Acacia. *Id.* If defendants refused, Acacia said, "then Acacia intends to bring a motion for summary judgment . . . asking the Court to adjudicate that all of the asserted claims are invalid as being indefinite, based on Acacia's stipulation." [*Id.* at p.2.] Further, Acacia said that it would "urge the Court not to consider any other motion proposed by defendants," and argued that the Court would lack jurisdiction to decide any such motion, because "[w]ith the stipulations provided by Acacia, there will no longer be a case or controversy." [*Id.*]

---

[1] The following defendants join in this motion: Comcast Cable Communications, LLC; Insight Communications, Inc.; The DirecTV Group, Inc.; Echostar Satellite LLC; Echostar Technolgies Corp.; Coxcom, Inc.; Hospitality Network, Inc.; Cable America Corp.; Charter Communications, Inc.; Wide Open West Ohio LLC; Armstrong Group; Massilon Cable TV, Inc.; East Cleveland Cable TV and Communications LLC; Mid-Continent Media, Inc.; Cannon Valley Communications, Inc.; US Cable Holdings, LP; Arvig Communications Systems; Sjoberg's Cablevision, Inc.; Cablevision, Inc.; Loretel Cablevision, Inc.; NPG Cable, Inc.; Block Communications, Inc.; Savage Communications, Inc.; Mediacom Communications Corp.; Cequel III Communications I, LLC (d/b/a Cebridge Connections); Cable One, Inc.; Bresnan Communications; Time Warner Cable, Inc.; and CSC Holdings, Inc.

Unable to agree, the parties presented their respective positions to the Court at the May 9 case management conference—*where the Court rejected Acacia's position, and ruled that defendants should bring their motions for summary judgment under § 112.* In the parties' Joint Statement submitted in advance of the conference, Acacia laid out in more than 16 pages its position that the Court should enter summary judgment now on only the narrow grounds that Acacia had strategically selected, and should "not permit Defendants to file any Section 112 summary judgment motions on alternative invalidity grounds[.]" [*See* Doc. No. 274 at 1, 9.] Defendants, for their part, objected that Acacia's proposal would be inefficient and would waste judicial resources. [*See id.* at 24-26.] After years of effort by the Court and the parties, this case is now ripe for disposition on multiple grounds. Yet under Acacia's proposal, only a small subset of those issues—hand-selected by Acacia—would be presented to the Federal Circuit. And if Acacia managed to prevail, the parties would then be back before this Court litigating issues that are ready to be decided today, and that are already presented in defendants' pending motions. Defendants also explained in the Joint Statement that Acacia's argument that its stipulation negates a case or controversy was wrong as a matter of law.[2] [*See id.* at 20-24.]

After considering the parties' extensive briefing, and after a full hearing, the Court adopted defendants' proposal and rejected Acacia's. Specifically, the Court ruled that it would

[2] As defendants explained, even if the Court were to grant Acacia's motion now, it would still retain jurisdiction to decide defendants' § 112 motions. However, Acacia has made clear that it will *argue* that a ruling on its motion now would strip this Court of further jurisdiction. [*See* Doc. No. 274 at 9-14.] Presumably, Acacia would file a notice of appeal immediately after such a ruling, then contest further jurisdiction in this Court. To avoid this result, the Court should continue the hearing on Acacia's motion, and rule on it at the same time that it rules on defendants' pending motions.

hear and decide all of defendants' proposed § 112 motions. Following the conference, the parties submitted an *agreed* briefing schedule for those motions. [Doc. No. 280.] Pursuant to that schedule, defendants filed their motions on July 11, 2008. [*See* Doc. Nos. 291-303.] Acacia's opposition is due on October 24, defendants' reply is due January 9, and the Court will thereafter set a hearing date. [Doc. No. 280.]

Acacia, however, has chosen to defy the Court's ruling. Without prior notice to the defendants or approval from the Court, on June 17, Acacia filed a motion for summary judgment *against* itself on the grounds that it previously proposed in its stipulation. [Doc. No. 287.] The proposed order that it submitted with its motion asks the Court to enter "judgment" in favor of defendants on only the grounds selected by Acacia—excluding all the other § 112 issues that defendants raised in their pending motions. [Doc. No. 289.] Acacia noticed its motion for hearing on July 7, but the Court *sua sponte* continued the hearing date to October 20. [Doc. No. 290.]

After Acacia filed its motion, defendants asked it to stipulate to continue the hearing date to coincide with the hearing on defendants' pending § 112 motions. *See* Declaration of David J. Silbert ("Silbert Decl.") ¶ 2. Defendants explained that it appeared that Acacia's purpose was to prevent the Court from deciding defendants' pending § 112 motions—the motions that the Court had specifically ordered that defendants should bring. *See id.* at Ex. 1 (Sept. 15 letter from Benyacar to Block). Acacia did not deny that this was its purpose. Instead, it refused to stipulate to continue the hearing date, and urged the defendants to stipulate now to the entry of "judgment" on only the grounds selected by Acacia. *See id.* at Ex. 2 (Sept. 12 email from Block to defense counsel).

III. ARGUMENT

Civil L.R. 7-11 authorizes parties to move for administrative relief including continuing hearing dates. Under Civil L.R. 7-11, the Court should continue the hearing on Acacia's summary-judgment motion to coincide with the hearing on defendants' pending § 112 motions, once the Court sets that hearing.

Acacia's tactic is obvious. After urging the Court not to decide defendants' § 112 motions, and failing, Acacia has decided to take matters into its own hands. It hopes to obtain a "judgment" on only the limited grounds that it has strategically selected, and then argue that the Court lacks jurisdiction to do more. The Court should put a stop to this ploy now.

Acacia will suffer *no* prejudice if the hearing date on its motion is continued to coincide with defendants' § 112 motions, since no judgment can or should be entered before defendants' pending motions are decided. The only "prejudice" that Acacia could claim is that it will be forced to abide by the Court's ruling, and defendants' pending motions will be decided—exactly what Acacia's motion aims to prevent.

Acacia's motion is an improper attempt to create a basis for Acacia to contest this Court's continuing jurisdiction. The Court should forestall this tactic by continuing the hearing date.

IV. CONCLUSION

For the foregoing reasons, pursuant to Civil L.R. 7-11, the Court should continue the hearing on Acacia's motion for summary judgment.

Respectfully submitted,

Dated: September 23, 2008

DARALYN J. DURIE (CA SBN 169825)
DAVID J. SILBERT (CA SBN 173128)
KEKER & VAN NEST, LLP
710 Sansome Street
San Francisco, CA 94111-1704

By /s/ David J. Silbert
David J. Silbert
Attorneys for Defendants
COMCAST CABLE COMMUNICATIONS, LLC, and INSIGHT COMMUNICATIONS, INC.

Dated: September 23, 2008

VICTOR G. SAVIKAS (CA SBN 145658)
KEVIN G. McBRIDE (CA SBN 195866)
LOUIS TOUTON (CA SBN 102380)
MARSHA E. MULLIN (CA SBN 93709)

JAMES E. GLORE (CA SBN 215933)
JONES DAY
555 South Flower Street, Fiftieth Floor
Los Angeles, California 90071

By /s/ Kevin McBride
Kevin McBride
Attorneys for Defendant
THE DIRECTV GROUP, INC.

Dated: September 23, 2008

HAROLD J. McELHINNY (CA SBN 66781)
RACHEL KREVANS (CA SBN 116421)
MATTHEW I. KREEGER (CA SBN 153793)
JASON A. CROTTY (CA SBN 196036)
DAVID M. HYMAS (CA SBN 226202)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482

By /s/ Matthew I. Kreeger
Matthew I. Kreeger
Attorneys for Defendants
ECHOSTAR SATELLITE LLC and ECHOSTAR TECHNOLOGIES CORPORATION

Dated: September 23, 2008

ANNAMARIE A. DALEY (*pro hac vice*)
ROBINS, KAPLAN, MILLER & CIRESI LLP
2800 LaSalle Plaza, 800 LaSalle Avenue
Minneapolis, Minnesota 55402

RICHARD R. PATCH (CA SBN 88049)
J. TIMOTHY NARDELL (CA SBN 184444)
COBLENTZ, PATCH, DUFFY & BASS, LLP
One Ferry Building, Suite 200
San Francisco, California 94111-4213

By Annamarie A. Daley
Annamarie A. Daley
Attorneys for Defendants
COXCOM, INC., HOSPITALITY NETWORK, INC., and CABLE AMERICA CORPORATION

Dated: September 23, 2008

BRADFORD LYERLA (*pro hac vice*)
KEVIN HOGG (*pro hac vice*)
JEFFREY DEAN (*pro hac vice*)
MARSHALL, GERSTEIN & BORUN LLP

6300 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606-6357

MORGAN W. TOVEY (CA SBN 136242)
WILLIAM R. OVEREND (CA SBN 180209)
REED SMITH LLP
Two Embarcadero Center, Suite 2000
San Francisco, CA 94111

By /s/ Jeffrey Dean
Jeffrey Dean
Attorneys for Defendants
CHARTER COMMUNICATIONS, INC., WIDE OPEN WEST OHIO LLC, ARMSTRONG GROUP, MASSILON CABLE TV, INC., EAST CLEVELAND CABLE TV AND COMMUNICATIONS LLC, MID-CONTINENT MEDIA, INC., CANNON VALLEY COMMUNICATIONS, INC., US CABLE HOLDINGS, LP, ARVIG COMMUNICATIONS SYSTEMS, SJOBERG'S CABLEVISION, INC., LORETEL CABLEVISION, INC., NPG CABLE, INC., BLOCK COMMUNICATIONS, INC.; SAVAGE COMMUNICATIONS, INC.

DATED: September 23, 2008

MITCHELL D. LUKIN
BAKER BOTTS LLP
One Shell Plaza
910 Louisiana
Houston, Texas 77022

JEFFREY D. SULLIVAN
BAKER BOTTS LLP
30 Rockefeller Plaza
New York, New York 10112

STEPHEN E. TAYLOR
TAYLOR & CO. LAW OFFICES, INC.
One Ferry Building, Suite 355
San Francisco, California 94111

By /s/ Mitchell D. Lukin
Mitchell D. Lukin
Attorneys for Defendants
MEDIACOM COMMUNICATIONS CORPORATION, and CEQUEL III COMMUNICATIONS I, LLC (d/b/a CEBRIDGE CONNECTIONS)

DATED: September 23, 2008

MITCHELL D. LUKIN
BAKER BOTTS LLP
One Shell Plaza
910 Louisiana
Houston, Texas 77022

JEFFREY D. SULLIVAN
BAKER BOTTS LLP
30 Rockefeller Plaza
New York, New York 10112

By /s/ Mitchell D. Lukin
Mitchell D. Lukin
Attorneys for Defendants
CABLE ONE, INC., and BRESNAN COMMUNICATIONS

DATED: September 23, 2008

DAVID S. BENYACAR
DANIEL REISNER
KAYE SCHOLER, LLP
425 Park Avenue
New York, N.Y. 10022-3598

By /s/ David S. Benyacar
David S. Benyacar
Attorneys for Defendant
TIME WARNER CABLE, INC.

DATED: September 23, 2008

BENJAMIN HERSHKOWITZ
GIBSON, DUNN & CRUTCHER
200 Park Avenue
New York, N.Y. 10166-0193

By /s/ Benjamin Herskowitz
Benjamin Hershkowitz
Attorneys for Defendant
CSC HOLDINGS, INC.